U.S. Department of Labor

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IN THE MATTER OF:              *
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Joseph G. Lesniak              *  Case No.: 2000-LHC-2425
     Claimant                  *
                               *  OWCP No.: 1-148995
          Against              *
                               *
Electric Boat Corporation      *
     Employer/Self-Insurer     *
                               *
          and                  *
                               *
Director, Office of Workers'   *
Compensation Programs          *
U.S. Department of Labor       *
     Party-in-Interest         *
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APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 19, 2000 in New London, Connecticut, at which time all parties were given the

opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 5	Attorney Oberlatz's letter filing the	03/09/01
RX 6	January 10, 2001 Deposition Testimony of Milo Pulde, M.D., as well as the	03/09/01
RX 7	September 6, 2000 letter from Attorney Proctor to counsel for the Director, OWCP, advising that the Employer would be seeking Section 8(f) relief herein.	03/09/01
CX 2	Dr. Pella's deposition testimony	03/19/01

The record was closed on March 19, 2001 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times and until July 5, 1989.

3. Claimant alleges that he has suffered a pulmonary injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on May 24, 2000.

7. The applicable average weekly wage is $450.64.

8. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether or not Claimant’s pulmonary condition is causally related to his maritime employment.

2. If so, the nature and extent of Claimant's disability.

3. The date of his maximum medical improvement.

4. Entitlement to an award of medical benefits and interest on past due compensation benefits.

5. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Joseph G. Lesniak ("Claimant" herein), sixty-nine (69) years of age, began working on April 22, 1959 as a painter at the Groton, Connecticut shipyard of the Electric Boat Company, a division of the General Dynamics Corporation (“Employer”), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a painter/cleaner Claimant’s duties involved, **inter alia**, sandblasting and cleaning the metal surfaces of the boats to prepare them for painting, Claimant describing sandblasting work as one of the dirtiest jobs at the shipyard, work as a pipe lagger being the dirtiest. He used steel shot and so-called “black beauty” to perform his sandblasting duties and, after cleaning the metal surfaces, he then applied a primer coat and then the finished coat of paint. He also used a paint thinner to clean the surfaces. He daily worked with lead paint until such use was stopped; he has also used epoxy paints, a highly toxic paint, according to Claimant. Later on in his employment he wore a respirator or face mask because of the fumes and dust in the Paint Shop. He was also exposed to asbestos dust and fibers as he worked in close proximity to the laggers who were cutting and applying asbestos as insulation around the pipes, Claimant remarking that such cutting of asbestos caused asbestos debris to fly around the ambient air of the work environment. As that debris ended up in the bilges of the boats, Claimant had to go down to that level to sweep up that debris into bags. He also worked in close proximity to the other trades, such as grinders, welding, carpenters, etc., and

their work generated much smoke, dust, fumes, all of which Claimant inhaled on a daily basis. (TR 18-21)

Claimant voluntarily left the shipyard on July 5, 1989 and he went to work at Branford Soap from July 5, 1989 through August of that year; he then went to work as a maintenance person at a correctional institution for three months and he then did the same work at a hospital. He stopped working in 1993 at age 62. He began to experience breathing problems shortly thereafter and on January 27, 2000 he went to see Dr. John A. Pella, a pulmonary specialist, and the doctor states as follows in his report (CX 1):

"Mr. Lesniak was seen in my office for reevaluation of his pulmonary status. He was last evaluated per report of 7/28/92. Since that visit his respiratory complaint is that of a chronic morning cough associated with sputum production. He denied hemoptysis, chest pain or wheezing. With regard to his ambulatory capacity, he is able to walk approximately three miles daily but has mild dyspnea with inclines or stairs.

"He currently treats with Dr. Mary Lyster of West Warwick, Rhode Island, on an annual basis. His only current medication is Lipitor for hypercholesterolemia.

"He had an interim surgical history of undergoing a right hip replacement in 1996 by Dr. Infantilino at the Kent County Memorial Hospital. He relates no interval chest X-ray or pulmonary function testing since my previous evaluation. He remains an ex-smoker.

"On physical exam Mr. Lesniak was in no distress. Weight 175lbs, B/P 160/90. There was no cervical adenopathy or neck vein distention. Chest examination revealed scattered rhonchi on auscultation which partially cleared with coughing. No crackles were heard. Cardiac exam was without murmur or gallop. There was no peripheral edema, digital cyanosis or clubbing.

"His current chest X-ray demonstrated an increased prominence of interstitial marking and possible pleural thickening. His pulmonary function testing demonstrated mild airways obstruction without significant improvement after inhaled bronchodilator. The single breath diffusion capacity was significantly reduced. Because of the above noted roentgenographic changes Mr. Lesniak was referred for a high resolution CT scan of the chest which was interpreted per the enclosed report. In my opinion the scan demonstrates a mild increase in interstitial markings with pleural plaques. The configuration of the plaque is more consistent with as being caused by asbestos dust exposure than to past granulomatous disease. Please note that calcification of

pleural plaques although characteristic, is certainly not a necessary criteria for asbestos-related causality.

"In summary, Mr. Lesniak has a clinical complaint of mild dyspnea on exertion with daily cough and sputum production. His roentgenographic studies demonstrate an increased interstitial markings pattern which in my opinion, are consistent with a reading of 1/1 by I.L.O. standards.

"His chest CT scan confirms bilateral pleural plaquing with increased interstitial markings. His pulmonary function testing demonstrates a significant reduction of lung volumes in excess of predicted decline since a prior study in 1992 and the vital capacity has now become mildly reduced. The reduction of flow rates on spirometry is consistent with mild obstructive lung disease and chronic bronchitis.

"In my medical opinion Mr. Lesniak has asbestos-related pleural-parenchymal lung disease superimposed on mild chronic obstructive lung disease. I would place him in a Class II impairment, approximately 25% reduction of the whole man on a respiratory basis per AMA guides to evaluation of permanent impairment. Approximately one half of this is related to occupational asbestos exposure and one half related to past cigarette smoking with a contribution of occupational dust, fume and smoke exposures," according to the doctor.

Claimant's February 22, 1999 chest x-ray was read by Dr. Jerrold R. Robins as showing "mild bilateral pleural thickening" and his January 18, 2000 high resolution CT Scan of the chest was read by Dr. William F. Coscina as showing "interstitial disease with minimal pleural involvement." (CX 1)

The Employer has had Claimant examined by its medical expert, Dr. Milo Pulde, and the doctor states as follows in his April 7, 2000 letter to Employer's counsel (RX 4):

"Mr. Joseph Lesniak was seen and evaluated in our offices on April 7, 2000. The claimant was a fair historian. Documents available for review include a chest x-ray 12/22/99. chest CT 1/18/00 and a review by Dr. Pella on January 27, 2000.

"Mr. Joseph Lesniak retired voluntarily in 1989 from Electric Boat. He was employed from 1959 to 1989. He states he was employed as both a painter and a sandblaster. He was unclear concerning the paints he used but these included epoxy, lead-based and enamel paints. For the first several years of his employment he used very little protective measures. In addition, he was involved in sandblasting of the exterior and interior hull. He states that he worked the 7:00 a.m. to 4:00 p.m shift up to seven days per week. His interior sandblasting work

consisted of participating in a 20-person crew who would initially sandblast the submarine over a 1-day period and then paint the exterior over two to three days. He was unclear concerning how many submarines he would paint per year. He would also work primarily in the interior of the submarines painting compartments with some sandblasting. Again, the use of protective equipment was variable.

“In 1989 the claimant retired because he ‘couldn't stand it’. He did not complain of respiration symptoms.

“On 12/22/99 the claimant underwent a set of pulmonary function tests. This revealed a ‘intact’ FEV1/FVC. The FEV1 was diminished. There was decrease in diffuse capacity and a question of mild restriction. A review of the lung volumes indicated an increased residual Volume of 110%.

“Chest x-ray 1/26/00 revealed mild pleural thickening.

“Chest CT 1/18/00 revealed ‘minimal interstitial disease with minimal pleural involvement’ most likely due to old granulomatous disease and asbestosis.

“On 1/27/00 the Claimant was seen by Dr. Pella. He was noted to ‘walk approximately two miles a day.’ There was a history of hypercholesterolemia. He had a recent hip replacement. Dr. Pella reviewed chest x-ray which was read as 1/1 by ILO standards. His pulmonary function test were consistent with ‘mild obstructive lung disease and mild bronchitis.’ It was Dr. Pella's opinion the Claimant had ‘asbestos-related pleural parenchymal lung disease superimposed on mild chronic obstructive pulmonary disease.’

“The claimant states he has a cough, variable, often productive often nonproductive. When productive there are large mucous plugs. This occurs in the morning and in the evening. He states he walks approximately two and a half to three miles a day and was walking up to five miles per day until recently. He states he walks up a set of bleachers in 10 sets without difficulty. He uses one pillow. He has two pet dogs and one pet cat. He has a wood stove but baseboard heat. His house consists entirely of thick-pile rugs. He has a history of GERD but this is quiescent. He denies PND, orthopnea, edema. There is no family history of lung disease. He denies seasonal rhinitis, eczema, asthma or Sampter's triad.

“There is history of hypercholesterolemia dated from 1990. He has been on Lipitor until recently which he discontinued because of cost consideration. He is now on Lopid. His cardiac risk factors include male gender, history of tobacco (use?), hypertension. He denied exertional chest pressure. There is a

history of a total hip replacement in 1996 and a history of occasional low back pain but no radicular symptoms. He states he has a history of hypertension but he has not been treated for this.

PAST MEDICAL HISTORY

Medication: Lopid 600 b.i.d.

1. Chronic obstructive pulmonary disease secondary to tobacco abuse with probable emphysema by pulmonary function test 12/22/99 with question bilateral pleural thickening by chest x-ray 12/22/99 with probable old granulomatous disease and minimal interstitial disease with minimal pleural involvement by chest CT 1/18/00.

2. Hypercholesterolemia, nonfamilial polygenic.

3. Status post total hip replacement, right, 1996.

4. History of hypertension. JNC 6. stage 1B.

5. History of gastroesophageal reflux disease.

CONCLUSIONS

“There is clinical and objective evidence that supports a diagnosis of chronic obstructive pulmonary disease secondary to tobacco abuse with chest x-ray 12/22/99 revealing mild bilateral pleural thickening but chest CT 1/18/00 revealing interstitial disease with mild pleural involvement which was considered ‘due to old granulomatous disease rather than asbestosis’ with question of emphysema by pulmonary function test 12/22/99. The evidence also supports a diagnosis of hypertension, hypercholesterolemia, history of gastroesophageal reflux disease, and history of total hip replacement right. There is no evidence to suggest any occupational lung disease including pneumoconiosis, (silicosis/asbestosis), occupational asthma, or hypersensitivity. Clinically the claimant is asymptomatic. There is no disability based on any pulmonary disorder.

“The salient features include outstanding history of tobacco abuse consisting of one to two packs per day for 23 years with only recent symptomotology consisting of ‘chronic cough but no clear cut dyspnea’ with chest x-ray 12/22/99 revealing‘mild bilateral pleural thickening’ without pleural calcification, and chest CT 1/18/00 revealing ‘minimal interstitial disease with a pleural involvement most likely due it) old granulomatous disease and asbestosis’ and pulmonary function test 12/22/99 revealing an ‘intact’ FEV1/FVC and ‘mild restriction’ with

‘diffuse capacity diminished reflecting moderate loss alveolar capillary interface.’

“The Claimant’s principle (sic) occupational exposure consists of exposure to paints and sandblasting. Based on the Claimant's history and objective studies there was no history of occupational asthma. Specifically there was no evidence to suggest occupational asthma with or without latencies or work-aggravated asthma. Although the Claimant was potentially exposed to toluene diIsocyanates there was no evidence to suggest reactive airways disease syndrome. This is based principally on the Claimant's pulmonary function studies.

“There was no evidence to suggest pneumoconiosis. Specifically there was no evidence to suggest silicosis or asbestosis despite the Claimant’s exposure history.

“There was specifically no evidence to suggest asbestosis. Asbestosis represents a group of mineral hydrate silicates which, because of their thermal resistance for the destruction and use of a variety of manufacturing processes. Asbestos exposure is ubiquitous and the fibers can be found in the lungs of almost everyone in the population. (Chung, **Pathology Mineralogy,** 1983-84 (3): 275-80).

“Asbestos is generally inhaled as particles which can be lodged in the lung which can remain there indefinitely. Exposure to asbestos can result in a spectrum of disorders which can include benign pleural plaques, which consist of a mark of asbestos but not an asbestos-related disorder, fibrosis of the lung tissue, which is termed asbestosis, and asbestos-related malignancy including mesothelioma.

“In general, the level of asbestos exposure can be derived from an individual's occupational history. High risk exposure consists of crushing, milling and packaging of asbestos as well as tile removal of old asbestos insulation. Low risk exposure consists of employment in the buildinu and construction trades. The Claimant's exposure to risk would be considered low or minimal.

“Based on the studies reviewed, there is no evidence to suggest asbestos-benign pleural disease. There are four types of benign pleural disorders associated with asbestos which include benign pleural effusions, pleural plaques, pleural fibrosis and rounded atelectasis. Pleural plaques are the most common manifestation of exposure to asbestos. These plaques are seen in the lower half of the lateral aspects of the lung and can become calcified with time. These plaques need to be differentiated from other causes of pleural reaction including inflammatory diseases. At present there is no evidence to suggest that pleural plaques

result in any functional significant impact (American Thoracic Society, **American Review of Respiratory Disease** 1986; 134:36-38. The Claimant's exposure history would be considered minimal. His CT scan did not demonstrate asbestos pleural plaques or parenchymal asbestosis. His pulmonary function tests were more consistent with emphysema and were borderline at best.

"The Claimant was also exposed to crystalline silica when employed as a sandblaster. Silicosis can result in a variety of clinical syndromes including acute, chronic and accelerated silicosis. There is no evidence to suggest the presence of any of these disorders. In chronic silicosis there are radiographic abnormalities without significant abnormalities in pulmonary function tests. Progressive massive fibrosis pulmonary function tests can result in restriction or combined restriction of the obstruction. Finally in simple silicosis there are radiographic findings with an excellent prognosis and without functional findings.

"Acute silicosis is excluded by the Claimant's history and chronic silicosis by the absence of multiple nodules or calcified the lymph nodes. Silicosis should be distinguished from other causes of diffuse parenchymal lung infiltration which most likely related to the Claimant's tobacco consumption. There are over approximately 130 disorders which can result in interstitial lung disease which certainly includes asbestos and silica but which also includes a variety of nonoccupational disorders including wood dust, metal dust, sarcoidosis, collagen vascular disease, certain metals and tobacco. It is well established that smoking is associated with interstitial pulmonary fibrosis. (**Hubbard, Lancet**, 1996; 347:284-289.)

"The Claimant's chest x-ray was apparently read as consistent with reading 1/1 of the ILO standard. It is well established that even among the 'best readers' the classification of a radiograph as positive disease is only corroborated 50% of the time by others of similar expertise. (Welch, **Chest** 114(6): 1740-1748.) Consequently, there is an enormous variability in the classification of radiographs using this classification scoring.

"The pulmonary function tests 12/22/99 revealed high residual volumes which may account for the restrictive findings noted as this increase in residual volume would limit inspiratory capacity and, hence, reduce vital capacity. Consequently, the FEV1/FVC ratio is only suggestive of restrictive disease but not necessary (sic) diagnostic of same. The Claimant's decrease diffusion capacity could be attributable to emphysema.

"The Claimant's impairment rating based on the **AMA Guide to the Evaluation of Permanent Impairment, 4th Edition**, would be considered Class II or mild based on the FVC of 67% in diffusing

capacity of 45%. These findings would be considered attributable to his chronic obstructive pulmonary disease. Again, he is currently asymptomatic clinically.

“In conclusion, the evidence supports a diagnosis of chronic obstructive pulmonary disease secondary to tobacco abuse but no evidence of occupational lung disorders including pneumoconiosis. hypersensitivity pneumonitis or occupational asthma. Although there is evidence of mild pleural thickening, there is no evidence of chronic silicosis or asbestosis. The Claimant’s clinical picture can be explained by chronic obstructive pulmonary disease alone. Finally, the evidence supports a diagnosis of hypercholesterolemia, hypertension, gastroesophageal reflux disease, total hip replacement.

Dr. Pella (CX 2) and Dr. Pulde (RX 6) elaborated upon and reiterated their opinions at their depositions on February 20, 2001 and January 10, 2001, respectively.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v.**

Bethlehem Steel Corp., 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not

caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee

bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the

employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

While the Employer has offered the report and deposition testimony of Dr. Pulde in an attempt to rebut the statutory presumption in Claimant’s favor, the Employer has not sustained it burden on this issue. Dr. Pulde, a Board-Certified Internist since 1981, reiterated his opinion that Claimant’s pulmonary condition is due **solely** to his cigarette smoking history and that his maritime exposures to the injurious stimuli played no part in such condition. (RX 4, RX 6)

However, in response to intense cross-examination, Dr. Pulde admitted that he had not personally reviewed Claimant’s diagnostic tests, just the doctors’ reports thereof, that

Claimant’s pulmonary function tests showed a restrictive lung disease, as well as an obstructive component, that Claimant had a fairly significant abnormality in his diffusing capacity and that Claimant’s pleural plaques bilaterally could be a marker of prior asbestos exposure. (RX 6 at 20-26)

Accordingly, in view of the foregoing, and as this claim aries within the jurisdiction of the U.S. Court of Appeals for the Second Circuit and, pursuant to **Pietrunti, supra,** I have given greater weight to the opinions of Dr. Pella, a pre-eminent pulmonary specialist.

This closed record conclusively establishes, and I so find and conclude, that Claimant’s daily exposure to and inhalation of asbestos dust and fibers and other pulmonary irritants in the course of his thirty year maritime employment have resulted in a mixed obstructive/restrictive lung disease, confirmed by his chest x-rays and his pulmonary function studies, that the date of injury is December 22, 1999, per the Board’s holding in **Romeike, supra,** that the Employer had timely notice of Claimant’s injury on or about February 15, 2000 (RX 1) and that the Employer timely controverted Claimant’s entitlement to benefits. (RX 2) The principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestos related pleural-parenchymal lung disease superimposed on mild chronic obstructive lung disease, resulted from his exposure to and inhalation of asbestos and other pulmonary irritants at the Employer's shipyard. The Employer has not introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively

minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction**

Co., 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning

capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant is a voluntary retiree as he voluntarily retired from the shipyard on July 5, 1989, worked elsewhere to

supplement his income, retired for good in 1993, at age 63, and as his asbestos-related disease was confirmed by x-ray on December 22, 1999. (CX 1) Moreover, as Claimant's pulmonary impairment was also confirmed by his December 22, 1999 pulmonary function studies, benefits for his twenty-five (25%) percent permanent partial impairment, according to Dr. Pella, whose opinion I accept, shall begin on that date and shall be based upon the National Average Weekly Wage as of that date, or $450.64.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (RX 2) **Ramos v. Universal Dredging Corporation**, 15

BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the

physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on February 15, 2000 (RX 1) and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer is responsible for such reasonable, necessary and appropriate medical care and treatment with reference to the work-related injury before me, subject to the provisions of Section 7 of the Act, and such benefits shall begin on December 22, 1999. (CX 1)

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.**, 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440

(3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial

disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that

the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

As Claimant was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for his asbestos-related pleural disease, only his prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, **see Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. **See**, **e.g.**, **MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due

to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, **supra**, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

However, in this case at bar, Claimant was in fairly good health at the time of his voluntary retirement in 1989, worked part time to supplement his retirement income and to keep himself busy until his final retirement in 1993, and his breathing problems did not become manifest, and were not diagnosed, until December 22, 1999.

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom.**, **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied.

Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982).

In the case at bar, the Employer relies upon Claimant's pre-existing pulmonary problems since at least 1992, his essential hypertension, his breathing problems since before he left the shipyard because that was one of the reasons he decided to leave the yard in support of its argument that Section 8(f) is applicable herein. As noted, Claimant had breathing problems when he retired voluntarily in 1989, and his mixed restrictive obstructive disease was not diagnosed with finality until December 12, 1999.

In the case at bar, Dr. Pella and Dr. Pulde are in agreement that Claimant's current permanent partial impairment of twenty-five (25%) is a so-called mixed obstructive/restrictive lung disease and directly resulted from Claimant's approximately (50) pack year cigarette smoking and his daily exposure to and inhalation of asbestos dust and fibers and other injurious pulmonary stimuli at the shipyard.

Thus, as Claimant's mixed lung disease was manifest to the Employer prior to the date of manifestation on December 22, 1999, the Employer is entitled to the limiting provisions of Section 8(f) of the Act.

In the case **sub judice**, Employer has demonstrated the existence of such pre-existing permanent partial disability and, **a fortiori**, Section 8(f) relief is available for the foregoing reasons.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA Guides. Therefore, where the first medical evidence of record sufficient to establish a permanent im-pairment of decedent's lungs under the AMA Guides was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after May 24, 2000, the date of the informal

conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition should be filed within thirty (30) days of receipt of this decision and Employer's counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer shall pay to Claimant compensation for his twenty-five (25%) percent permanent partial impairment from December 22, 1999 through the present and continuing, based upon the National Average Weekly Wage of $450.64, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act. Claimant submits his weekly payment totals $75.11.

2. The Employer's obligation herein is the payment of 104 weeks of permanent benefits.

3. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on May 24, 2000.

DAVID W. DI NARDI
Administrative Law Judge

Dated: March 21, 2001
Boston, Massachusetts
DWD:dsr